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No. 80-614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN W. MARTIN, *et al.*,
Petitioners,

versus

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA,
Respondent.

On Petition and Cross-Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO CROSS-PETITION OF JOHN W. MARTIN, *ET AL.*

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QUESTION PRESENTED

Whether the Personnel Board may provisionally use unvalidated examinations, pursuant to the provisions of the 1970 EEOC Guidelines on testing, without liability under Title VII.

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The respondent, the Personnel Board of Jefferson County, Alabama, respectfully submits this brief in opposition to the cross-petition for writ of certiorari filed by John W. Martin, *et al.*

STATEMENT OF THE CASE

The issue raised by the cross-petition of John W. Martin, *et al.*, (hereinafter "cross-petitioner" or "Martin") is limited to the scope of injunctive relief ordered by the courts below. The district court, after a finding that the police officer and firefighter examinations given by the Personnel Board of Jeffer-

son County (hereinafter the "Board") violated Title VII,[1] looked at the question of remedial relief. The trial court held that the preliminary or interim reports to the Board by the independent consultants "contained signs of potential validity and recommended the continued usage of the tests pending the additional studies." (A-56). The court, therefore, concluded that the Board, under the 1970 EEOC Guidelines,[2] could rely on the interim reports to establish a good-faith defense to a Title VII action. (A-56). The court held that subsequent studies showed that provisional use of the tests was no longer permissable and that the Board should have discontinued the use of the tests when the subsequent studies were delivered. The district court fixed the dates the independent consultants delivered the reports to the Board as the dates Title VII was first violated. The cross-petitioners disagree with the trial court's conclusion and argue that liability should be from the date Title VII became applicable to the Board.

The district court, in fashioning its equitable relief, ordered that the Board certify one black candidate for every three candidates certified for police officer until such time as the total number of blacks certified from April 25, 1975, became twenty-eight percent of the total number of persons certified. (A-57). Thereafter two of every seven persons certified from the administration of the police officer examination which had been challenged were to be black. In each new administration of the examination by the Board, the black certifications were to be based upon the percentage of black applicants for that examination.

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[1] The question of whether these examinations violated Title VII is raised by the Board in its petition for writ of certiorari in *Personnel Board* v. *United States,* Case No. 80-406.

[2] Equal Employment Opportunity Commission Guidelines on Employment Selection Procedures, 29 C.F.R. § 1607 (1970) (hereinafter "EEOC Guidelines"). The EEOC Guidelines were published in the *Federal Register* on August 1, 1970 (35 Fed. Reg. 12333). (A-171-182).

The district court used the same rationale for fashioning its relief for firefighter applicants. One of every three persons certified was to be black until the total number of blacks reached fourteen percent of the total certified. Subsequently, one of every seven persons certified by the Board was to be black, if the results of previously administered examinations were used. Thereafter, applicant flow was to determine the rate of certification.

The court of appeals recognized the theory of provisional use relied upon by the lower court, but remanded the case to the district court for further findings.

SUMMARY OF ARGUMENT

Good-faith reliance on the EEOC Guidelines provided a defense to a Title VII action until 1976, when revised versions of the testing guidelines expressly repealed this defense. The cases cited by Martin for the proposition that reliance on the EEOC Guidelines was not a defense dealt with EEOC internal memoranda, statements, or "no cause" letters and not official guidelines published in the Federal Register. The relief granted by the courts below created no "built-in headwinds" and was tailored to remedy the perceived wrong.

ARGUMENT

I. The Decision Below Does Not Conflict With Prior Decisions Of The Fourth, Fifth, and Seventh Circuits.

The cross-petitioner attempts to characterize the case at bar as conflicting with opinions of the various circuits. The court of appeals held that the Board could rely on the EEOC Guidelines if it could show several additional facts not yet in evidence. Martin ignores the fact that the good-faith reliance defense allowed by the lower courts was based upon EEOC Guidelines which were published in the Federal Register. The cross-petitioner cites cases dealing with "no cause" letters,[3] oral statements by the Chairman of the EEOC,[4] and EEOC internal memoranda[5] as authority for the proposition that Guidelines promulgated by the EEOC may not be used as "written interpretations or opinions of the Commission" for purposes of establishing a good-faith defense under § 713 of Title VII. The Fifth Circuit's opinion cannot be read to allow an employee to use statements, letters, or memoranda to assert a good-faith defense. The court of appeals decision permits reliance upon the EEOC Guidelines, as published in the Federal Register, and nothing further. Until this case was decided no circuit had addressed the issue of good-faith reliance on the original EEOC Guidelines.

The cross-petitioners try to characterize the court of appeals' opinion as very broad and far reaching. A close reading of the opinion will show that the provisional use exemption enunciated

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[3] *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

[4] *Local 189, United Papermakers* v. *United States*, 416 F.2d 980 (5th Cir. 1969).

[5] *Sprogis* v. *United Air Lines*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). *Sprogis* specifically stated "United does not contend that it relied upon anything published in the *Federal Register* by the Commissioner." 444 F.2d at 1200.

by the appellate court applied only to that period of time between the effective date of Title VII (March 24, 1972) and the date of the promulgation of the Department of Justice Guidelines[6] (November 17, 1976). At the time of their promulgation, the DOJ Guidelines contained a proviso that "[i]f the additional studies do not . . . demonstrate validity, the user is not relieved of or protected against any obligations arising under federal law." (A-145). The EEOC Guidelines, promulgated in 1970, did not contain such a proviso.[7] As the district court noted, the Personnel Board, prior to and subsequent to the time Title VII became applicable to municipal bodies, attempted to validate the police officer and firefighter examination pursuant to the EEOC Guidelines. The district court held that the Board used the examinations with good intent and in good faith reliance on its independent consultants' recommendations. This reliance and good faith was sufficient, according to the trial court, to excuse the Board, under the EEOC Guidelines, from liability up to April 25, 1975 (for police officer) and July 8, 1976 (for firefighter). The opinion in this case is based on a very narrow set of facts[8] which is not present in any of the decisions cited by the cross-petitioners.

II. The Decision Below Is Not In Conflict With Rosenfeld.

The cross-petitioner cites the case of *Rosenfeld* v. *Southern Pacific Company,* 444 F.2d 1219 (9th Cir. 1971) as conflicting

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[6] Department of Justice Guidelines on Employee Selection Procedures, 28 C.F.R. §50.14 (1976)(A-138).

[7] The EEOC Guidelines provide:

> *Sec. 1607.9. Continued Use of Tests* . . . [a] person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. (A-180).

[8] It should be further noted that the trial of this case was limited solely to the Board's use of the police officer and firefighter examinations and did not go into issues such as the applicability of the statute of limitations, the remedial effect of municipal hiring practices, or other issues which might mitigate the need for quota relief.

with the decision of the court below. The cross-petitioner asserts that *Rosenfeld* stands for the proposition that the Section 713(b) good-faith reliance defense is not applicable to declaratory or injunctive relief. What Martin overlooked was the fact that the *Rosenfeld* decision was "to have prospective application only" and did not impose quotas or any other type of remedial relief upon the employer, despite the fact that the employer's actions violated Title VII. The *Rosenfeld* decision did not address the issue of retroactive remedial relief, thus the decision in *Rosenfeld* cannot be extended to the case at bar.

III. **Section 713(b) Does Not Bar Injunctive Relief.**

In the case at bar the lower courts were looking to the EEOC Guidelines and the good-faith reliance defense in an attempt to fashion the most equitable relief under the circumstances of the case. Section 713(b) and the EEOC Guidelines make no distinction as to the types of relief subject to the good-faith defense. The lower courts were correct to consider the good-faith reliance defense when the remedial relief was fashioned.

IV. **The Lower Court Decisions Grant Full Relief.**

The district court strictly limited the issue in the case below to that of whether the Personnel Board's use of the police officer and firefighter tests violated Title VII. As noted earlier, the trial court expressly reserved all other questions in this action for trial at a future date. Interwoven in those questions are the issues of whether the statute of limitations was applicable; whether there should be injunctive or remedial relief with regard to the various municipal employers involved; back pay; other damages; and other issues which are normally present in Title VII litigation. The district court, in fashioning its temporary, remedial relief did not create any "built-in headwinds" for blacks. Martin overlooks the fact that the court created a very flexible method of granting remedial relief for correcting what it viewed to be violations of Title VII. It initially ordered quota certifications of thirty-three percent black until a "floor" of twenty-eight percent black certifications for police officer and

fourteen percent black certifications for firefighter were attained. After that time, and until on the next examination was administered, quotas of two blacks of seven candidates and one black of seven candidates for police officer and firefighter, respectively, were established. Each successive certification made by the Board was to be proportionate to the number of blacks taking the examination. For example, since 1978, forty-six percent of the applicants certified for police officer have been black, even though the work-force in Jefferson County is only twenty-seven percent black. These certification rates are due to the court imposed quotas and the Board's affirmative action efforts. The current certifications indicate that the cross-petitioners have a full and complete remedy available to them, and that the fears expressed in their petition about the lack of an adequate remedy are unjustified.

CONCLUSION

The cross-petition for certiorari in Case No. 80-614 should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Brief have this date been duly served by mail upon all counsel of record in this proceeding.

This the 24th day of November, 1980.

DAVID P. WHITESIDE, JR.


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